UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

DOYLE E. BETTERS, Appellant, v. FEDERAL EMERGENCY MANAGEMENT AGENCY, Agency.	DOCKET NUMBER DC04329110656 DATE: MAY 12 1993

Gregory L.A. Thomas, Esquire, Washington, D.C., for the appellant.

Robert S. Brock, Esquire, Washington, D.C., for the agency.

BEFORE

Daniel R. Levinson, Chairman
Antonio C. Amador, Vice Chairman
Jessica L. Parks, Member

OPINION AND ORDER

This case is before the Board on the agency's petition for review and the appellant's apparently untimely cross-petition for review of an initial decision, issued October 24, 1991, that did not sustain the appellant's removal for unacceptable performance under Chapter 43. For the reasons set forth below, we DENY the agency's petition for review because it does not meet the Board's criteria for review under

5 C.F.R. § 1201.115, and DISMISS the appellant's cross-petition for review as untimely filed.

BACKGROUND

The agency removed the appellant from his position of Computer Systems Analyst, GS-13, effective June 7, 1991. The agency based the removal action on a charge that the appellant's performance of critical elements 1, 3, and 4, of his performance standards was unacceptable during a performance plan. *See* Initial Appeal File (IAF), Tab 3, Subtabs Q and S. Prior to placing the appellant on the performance improvement plan (PIP), the agency detailed him to a position with different performance standards. *See* IAF, Tab 3, Subtab R, and Tab 1, Subtabs D and G. When the appellant was placed on the PIP, he was again given new performance standards and ultimately was removed under them. *See* IAF, Tab 1, Subtab N; Hearing Transcript (H.T.) at 66. The appellant appealed the removal action to the Board's Washington, D.C., Regional Office, alleging that the agency's action placing him on a detail and changing his performance standards deprived him of a reasonable opportunity to demonstrate acceptable performance. The administrative judge reversed the removal action, agreeing that the agency failed to provide a reasonable opportunity to demonstrate acceptable performance. He ordered the agency to cancel the appellant's removal and to provide the appellant with interim relief in accordance with the Whistleblower Protection Act of 1989. The

agency has submitted proof of compliance with the interim relief order. *See* Petition for Review (PFR) File, Tab 1, Exhibit 1.[1]

In its petition for review, the agency contends that the administrative judge erred in finding that the agency failed to provide the appellant with a meaningful opportunity to improve, in excluding certain testimony at the hearing, in not considering the appellant's position description and instead considering an earlier performance plan, and in not considering periods prior to the performance improvement period. The agency further contends that it has "new evidence" under 5 C.F.R. § 1201.115(c)(1), that consists of testimony of Gary C. Oran, the appellant's supervisor from April 1990 to April 1991, excluded by the administrative judge at the hearing.

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[1] On February 2, 1993, the appellant filed a Motion to Dismiss the agency's petition for review, alleging that the agency has failed to comply with the administrative judge's interim relief order. The appellant's evidence of noncompliance (denial of within-grade salary increase) was not available before the close of the record on petition for review. 5 C.F.R. § 1201.114(i); *Forma v. Department of Justice*, MSPB Docket No. SF0752920336-I-1, slip op. at 8. (Apr. 19, 1993). However, the motion does not demonstrate that the appellant exercised due diligence in filing it once he was notified of the agency's action by notice dated October 23, 1992. *See* PFR File, Tab 9. The appellant must also show that he exercised diligence or ordinary prudence under the circumstances of the case. *See Shiflett v. United States Postal Service*, 839 F.2d 669, 670-74 (Fed. Cir. 1988). Accordingly, we have not considered the appellant's motion. However, the appellant may again raise the issue in a petition for enforcement if he believes that the agency has failed to comply with the Board's final relief order. *See Ginocchi v. Department of Treasury*, 53 M.S.P.R. 62, 71 n.8 (1992).

The agency failed to provide the appellant with a reasonable opportunity to improve.

In *Sandland v. General Services Administration*, 23 M.S.P.R. 583, 587 (1984), the Board held that the opportunity-to-improve period is a substantive right. Thus, to sustain a removal under 5 U.S.C. Chapter 43, the agency must establish by substantial evidence, *inter alia*, that it gave the employee a reasonable opportunity to demonstrate acceptable performance. The administrative judge found that the agency failed in two respects to make this showing. First, he found that the appellant's performance was rated unsatisfactory in a position to which he had been detailed, and he was never informed that his performance in his official position of record was unsatisfactory. *See* Initial Decision (I.D.) at 3. Second, he found that when the agency placed the appellant on the PIP, it simultaneously presented him with revised performance standards substantially different from his prior standards, thereby depriving the appellant of a reasonable opportunity to demonstrate acceptable performance. *Id.*

The administrative judge found that the appellant was detailed for a period of 120 days effective April 23, 1990, from the GS-0334-13 position of Computer Systems Analyst, Office of Insurance Support Services, to the same position in the agency's Office of Insurance Operations, and that the

detail was extended to April 20, 1991. See IAF, Tab 3, Subtab L.[2]

With regard to the detail, the agency argues that because the position title and the occupational series of the two positions were identical, and only the appellant's supervisor and place of work were changed, it was not actually a detail. The agency reasons that it made every effort to move the appellant into a position with the same position description, in the same grade and series, and with performance standards fashioned to fit the position description. In addition, it notes that the performance standards were developed mutually by the agency and the appellant. It appears that the agency took steps it believed in good faith would ensure that the appellant's job duties remained the same. However, the propriety of a charge of unacceptable performance is judged not based on a position description but rather on the employee's performance plan and the elements and standards derived under it. *See Clifford v. Department of Agriculture*, 50 M.S.P.R. 232, 236 (1991).[3] An examination of the appellant's performance plan prior to being placed on the detail, see Initial Appeal File (IAF), Tab 1, Subtab G, shows that it differs substantially from the performance plan he

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[2] The appellant was placed on a performance improvement period for ninety days beginning December 11, 1990. See IAF, Tab 3, Subtab O(1).

[3] For this reason, the agency's argument that the appellant's duties during the performance improvement period were contained in his position description [illegible]

received when he was placed on the detail. *See* IAF, Tab 1, Subtab D; *see also* I.D. at 4-5. An employee is deprived of a meaningful opportunity to improve where the agency has not informed him that his performance in his official position of record was unsatisfactory and given him an opportunity to improve under the standards of that position, but instead has rated him unsatisfactory based on his performance in a position to which he has been detailed. *See Smith v. Department of the Navy*, 30 M.S.P.R. 253, 254-55 (1986).[4]

Moreover, in *Boggess v. Department of the Air Force*, 31 M.S.P.R. 461, 462-63 (1986), the Board held that by simultaneously presenting the appellant with revised performance standards that were substantially different from the prior standards and notifying him both that his performance was unacceptable and that he had thirty days to improve, the agency failed to fulfill the substantive requirement of 5 U.S.C. § 4303 to provide the appellant with a reasonable opportunity to improve. The Board found further that the appellant was entitled to an appraisal period under

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[4] Although *Smith* is factually distinguishable from the present case (because in *Smith* the employee had been detailed to a different grade and position), what is similar is that neither appellant was informed by the agency that his performance in his official position of record was unsatisfactory, and both removals were based only on performance in the detail position. This is not to say, however, that poor performance during a detail can never be used (at least in part) as the basis of a Chapter 43 action. Under 5 C.F.R. § 430.206(d), when an employee is placed on a detail, ratings on critical elements must be prepared and these ratings must be considered in deriving an employee's rating of record that covers that period.

the revised [illegible] to a reasonable opportunity to improve after [illegible]s performance was rated as deficient under those standards before the agency could properly initiate an action based an his unacceptable performance. *Id.* at 463. Accordingly, we find no error in the administrative judge's determination that the agency improperly rated the appellant's performance as unsatisfactory in the position to which he had been detailed.

The administrative judge found that the agency's failure in this regard went further when the agency gave the appellant a new performance plan when he was placed on the PIP. *See* IAF, Tab 1, Subtab N. This plan, too, differed significantly from that for the appellant's official position of record. Agencies may not use a PIP either to reduce or increase the standards of performance established at the beginning of the appraisal period. *See Brown v. Veterans Administration*, 44 M.S.P.R. 635, 643 (1990). Accordingly, we find no error in the administrative judge's finding that the agency improperly used a PIP to change the appellant's performance standards.

The agency also contends that the administrative judge erred by requiring the appellant's performance to be measured under a standard that existed prior to the PIP, *i.e.*, that for his official position of record, but then only allowing evidence of performance during the PIP, thereby excluding evidence related to the appellant's performance under the prior performance plan. The agency placed the appellant on a PIP because of his alleged poor performance under what was

then his existing performance plan. By changing the appellant's performance plan first by detail and then pursuant to the PIP, the agency did not allow the appellant a reasonable opportunity to demonstrate acceptable performance under the performance plan in which the agency alleged the appellant's performance was unacceptable. *See Smith*, 30 M.S.P.R. at 254-55; *Boggess*, 31 M.S.P.R. at 465-66.

With regard to the agency's "new evidence" allegation, the agency's petition for review fails to establish that its submission qualifies as such. By the agency's own description, its "new evidence" consists of testimony that was excluded by the administrative judge at the hearing. There, the agency sought to recall a witness on rebuttal. However, when questioned about the witness by the administrative judge, the agency representative stated that the purpose of the testimony would be to emphasize testimony already given by the witness. See H.T. at 176. Under these circumstances, the administrative judge properly excluded the testimony as improper rebuttal testimony. *See* 5 C.F.R. § 1201.41. Accordingly, we find that the agency's offer of new evidence fails to meet the Board's criteria under 5 C.F.R. § 1201.115(c)(1). *See Russo v. Veterans Administration*, 3 M.S.P.R. 345, 349 (1980); *Avansino v. U.S. Postal Service*, 3 M.S.P.R. 211, 214 (1980).

The appellant's cross-petition for review was untimely filed.

To establish good cause for an untimely filing, a party must show that he exercised due diligence or ordinary prudence

under the particular circumstances of the case. *See Alonzo v. Department of the Air Force*, 4 M.S.P.R. 180, 184 (1980). To be timely, the appellant was required to file his cross-petition for review by December 24, 1991. However, it was not filed until December 27, 1991. The appellant's counsel argues that he was unaware that Board regulations required the agency to serve the appellant with its petition for review. Rather, he states that he was under the mistaken belief that the 25-day period to file a cross-petition for review commenced with service of the Clerk of the Board's notice of December 9, 1991, acknowledging receipt of the agency's petition for review. *See* Petition for Review File, Tab 8 at 5. His reliance on the Clerk's notice of December 9, 1991, based on his mistaken belief that the agency was not required to serve him with the petition, does not establish good cause for the untimely filing. The Board's regulations state that a petition for review must be served on the other party. *See* 5 C.F.R. § 1201.26(b)(2) and 5 C.F.R. § 1201.114(h); *Haaland v. Department of Energy*, 34 M.S.P.R. 175, 176 (1987), *aff'd*, 846 F.2d 77 (Fed. Cir. 1988) (Table). Accordingly, we find that the appellant has not met his burden of showing good cause for the late filing of his cross-petition for review. *See Sargent v. Department of the Air Force*, 55 M.S.P.R. 387, 397 (1992).

ORDER

We ORDER the agency to cancel the appellant's removal and to restore the appellant effective June 7, 1991. *See Kerr*

v. *National Endowment for the Arts*, 726 F.2d 730 (Fed. Cir. 1984). The agency must accomplish this action within 20 days of the date of this decision.

We also ORDER the agency to issue a check to the appellant for the appropriate amount of back pay, interest on back pay, and other benefits under the Office of Personnel Management's regulations, no later than 60 calendar days after the date of this decision. We ORDER the appellant to cooperate in good faith in the agency's efforts to compute the amount of back pay, interest, and benefits due, and to provide all necessary information the agency requests to help it comply. If there is a dispute about the amount of back pay, interest due, and/or other benefits, we ORDER the agency to issue a check to the appellant for the undisputed amount no later than 60 calendar days after the date of this decision.

We further ORDER the agency to inform the appellant in writing of all actions taken to comply with the Board's Order and of the date on which the agency believes it has fully complied. If not notified, the appellant should ask the agency about its efforts to comply.

Within 30 days of the agency's notification of compliance, the appellant may file a petition for enforcement with the regional office to resolve any disputed compliance issue or issues. The petition should contain specific reasons why the appellant believes that there is insufficient compliance, and should include the dates and results of any communications with the agency about compliance.

This is the final order of the Merit Systems Protection Board in this appeal with regard to the timeliness of the appellant's cross-petition for review. The initial decision is the final decision on the merits of the appellant's appeal. 5 C.F.R. § 1201.113.

NOTICE TO APPELLANT

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. *See* 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:

/s/
Robert E. Taylor
Clerk of the Board

Washington, D.C.